1485.

SUPREME COURT OF THE UNITED STATES.

No. 142.

ROBERT W. WITHERS, PLAINTIFF IN ERROR,

vs.

WILLIAM B. GREENE, ADMINISTRATOR OF RICHARD MAY, DECEASED.

IN ERROR TO THE CIRCUIT COURT UNITED STATES FOR SOUTHERN DISTRICT OF ALABAMA.

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UNITED STATES OF AMERICA,
Middle district of Alabama.

Pleas before the honorable the district court of the United States, for the middle district of Alabama, at a term thereof begun and held at Tuskaloosa, on the fourth Monday of May, in the year of our Lord one thousand eight hundred and forty three. The honorable William Crawford, judge of said court, presiding.

Be it remembered, that heretofore, to wit, on the twelfth day of May, anno domini one thousand eight hundred and forty, was issued from the clerk's office of said court a writ of capias ad respondendum, which, with the marshal's return thereon, is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District court of the United States,
for the middle district of Alabama.

The President of the United States, to the marshal of said district, greeting:

You are hereby commanded to take the body of Robert W. Withers, who is a citizen of the State of Alabama, and him safely keep, so that you have him before the honorable the judge of the said court, at the place of holding said court, at Tuskaloosa, on the fourth Monday of May, 1840, to answer to Richard May, who is a citizen of the State of Virginia, in a plea of debt, that he, said Robert W. Withers, render unto said Richard May the sum of three thousand dollars, which to him he owes and from him unjustly detains, to the damage of the said plaintiff one thousand dollars. Herein fail not, and have you then there this writ.

Witness the Hon. William Crawford, judge of the said court, the first Monday after the fourth Monday of November, in the year [L. S.] of our Lord one thousand eight hundred and thirty-nine.

Issued the 12th day of May, in the year of our Lord one thousand eight hundred and forty.

Attest: A. G. GOOCH, *Clerk D. C.*
Middle district of Alabama.

This action is founded upon an instrument in writing, in substance as follows: "By the first of January next, I promise to pay A. B. Newsom or order, the just sum of three thousand dollars, for value received of him; given under my hand and seal, this 16th February, 1839.

(Signed) ROBERT W. WITHERS." [SEAL.]

Which instrument has been duly assigned to the plaintiff herein.

Attest: VANDEGRAFF, STEELE & METCALFE,
Attorneys for plaintiff.

"Received and executed 20th May, 1840.

R. L. CRAWFORD, *U. S. Marshal.*
By J. A. BEAL, *D. M.*"

And afterwards, to wit, on the 29th day of May, A. D. 1840, the plaintiff filed his declaration in the following words and figures, to wit:

District court of the United States of America, middle district of the State of Alabama, May term, A. D. 1840.

Richard May, who is a citizen of the State of Virginia, by attorney, complains of Robert W. Withers, who is a citizen of the State of Alabama, defendant in custody, &c., of a plea of debt that he, the said defendant, render unto him, the said plaintiff, the sum of three thousand dollars, which he owes to, and unjustly detains from him. For that whereas, the said defendant, heretofore, to wit, on the sixteenth day of February, A. D. 1839, at, to wit, in the middle district of the State of Alabama aforesaid, made his certain writing obligatory, subscribed with his name and sealed with his seal, and here by the said plaintiff brought into and shewn to the court, and thereby then and there promised by the first of January next, meaning thereby the first of January next after the date thereof, to pay A. B. Newsom, (who was, hath ever since been, and still is, a citizen of the State of Tennessee,) or order, the just sum of three thousand dollars, for value received; and the said A. B. Newsom, after the making of the said writing obligatory, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at, to wit, in said middle district, indorsed the said writing obligatory, and thereby then and there ordered and appointed the said sum of money therein specified to be paid to the said plaintiff, and then and there delivered the said writing obligatory, so indorsed as aforesaid, to the said plaintiff, of which said indorsement the said defendant then and there had notice. Nevertheless, the said defendant, although often requested so to do, has not paid the said plaintiff, nor the said A. B. Newsom, before notice of indorsement and transfer, the said sum of money in said writing obligatory specified, but so to do has wholly failed and refused, and still fails and refuses, to the plaintiff's damage one thousand dollars, and therefore suit is brought, &c.

VANDEGRAFF, STEELE & METCALFE.
Plaintiff's attorneys.

(Memorandum. The pleas first filed herein by defendant, with plaintiff's replication thereto, have by consent of parties been withdrawn.)

And afterwards, to wit, at the term of said court, begun and held on the first Monday after the fourth Monday of November, anno domini one thousand eight hundred and forty, "came the parties by their attorneys, and this cause was ordered to be continued on affidavit of defendant."

And afterwards, to wit, at the term of said court, required by law to be held on the fourth Monday of May, anno domini one thousand eight hundred and forty-one, the honorable William Crawford, judge of said court, failing to attend, this cause was continued by virtue of the act of Congress in such case made and provided.

And afterwards, to wit, at the term of said court, begun and held on the first Monday after the fourth Monday of November, anno domini one thousand eight hundred and forty-one, came the parties, by their attorneys; whereupon, it is ordered, that this cause be continued, and that the said defendant have leave to file additional pleas.

And afterwards, to wit, at the term of said court, begun and held on the fourth Monday of May, anno domini one thousand eight hundred and forty-two, it being suggested that said plaintiff has departed this life since the last term of this court, it is ordered that a writ of scire facias be issued to the personal representatives of the said plaintiff, and that this cause be continued.

And afterwards, to wit, on the twentieth day of August, anno domini one thousand eight hundred and forty-two, a writ of scire facias was issued, which, with the marshal's return thereon, is in the following words and figures, to wit:

UNITED STATES OF AMERICA,
District court of the U. S., for the middle district of Alabama:

The President of the United States, to the marshal of said district, greeting:

Whereas at a term of said court, begun and held for said district, on the fourth Monday of May, anno domini 1842, in a certain suit therein pending between Richard May, plaintiff, and Robert W. Withers, defendant, it was suggested that since the last term of this court said Richard May, plaintiff, had departed this life; whereupon, it was ordered, that a writ of scire facias issue to the personal representatives of the said plaintiff; you are therefore hereby commanded to make known to the personal representatives of the said Richard May, that they appear before the district court aforesaid, at the place of holding said court, at Tuskaloosa, on the first Monday after the fourth Monday of November next, then and there to do and receive what said district court shall in this behalf consider. Herein fail not, and have you then and there this writ, showing by your return thereon to whom you shall have made known the same, and whether they be executors or administrators of the said Richard May.

Witness the honorable William Crawford, judge of the said district court, the fourth Monday of May, in the year of our Lord one thousand eight hundred and forty-two. Issued the 20th day of August, in the year of our Lord one thousand eight hundred and forty-two.

[SEAL.]

Attest: A. G. GOOCH, *Clerk D. C.*
Middle district Alabama.

Received, 5th September, 1842. No representatives found.
WILLIAM ARMISTEAD,
United States Marshal.
By J. A. BEAL, *Deputy Marshal.*

And afterwards, to wit, at the term of said court, begun and held on the first Monday after the fourth Monday of November, anno domini one thousand eight hundred and forty-two, the following order was had, to wit:

The writ of scire facias heretofore issued in this cause to the personal representatives of the plaintiff having been returned "no representatives found;" it is ordered by the court now here, that an alias writ of scire facias issue, returnable to the next term of this court, and that this cause be continued.

And afterwards, to wit, on the fourteenth day of January, anno domini one thousand eight hundred and forty-three, an alias writ of scire facias was issued, which, with the marshal's return thereon, is in the following words and figures, to wit:

UNITED STATES OF AMERICA,
District court of the U. S., for the middle district of Alabama:

The President of the United States, to the marshal of said district, greeting:

Whereas at a term of said court, begun and held for said district, on the fourth Monday of May, anno domini 1842, in a certain suit therein pending between Richard May, plaintiff, and Robert W. Withers, defendant, it was suggested, that since the last term of this court that said Richard May, plaintiff, had departed this life; whereupon, it was ordered, that a writ of scire facias issue to the personal representatives of the said plaintiff; you are therefore hereby commanded, as you have heretofore been, to make known to the personal representatives of the said Richard May, that they appear before the district court aforesaid, at the place of holding said court, at Tuskaloosa, on the fourth Monday of May next, then and there to do and receive what said district court shall in this behalf consider. Herein fail not, and have you then and there this writ, showing by your return thereon to whom you shall have made known the same, and whether they be executors or administrators of the said Richard May.

Witness the honorable William Crawford, judge of the said district court, the first Monday after the fourth Monday of November, in the year of our Lord one thousand eight hundred and forty-two. Issued the 14th day of January, in the year of our Lord one thousand eight hundred and forty-three.

[SEAL.]

Attest: A. G. GOOCH, *Clerk D. C.*
Middle district Alabama.

Received 14th January, 1843. Not found.
WILLIAM ARMISTEAD,
United States Marshal.
By J. A. BEAL, *Deputy Marshal.*

And afterwards, to wit, at the term of said court first aforesaid, to wit, on the 26th day of May, anno domini one thousand eight hundred and forty-three, an order was had in the words following, to wit:

This day came William B. Greene, who is a citizen of the State of Virginia, by attorney, and having produced to the court letters of administration, showing that the said Greene has been duly appointed administrator, with the will annexed, of the said Richard May, deceased, it is ordered, that the said William B. Greene, administrator as aforesaid, be made a party plaintiff in this cause.

And afterwards, to wit, on the day and year last aforesaid, the defendant filed a further plea, which is in the words and figures following, to wit:

DISTRICT COURT:

And for a further plea in this behalf, said defendant, by leave, &c.; says *onerare non*, because he says, that heretofore, to wit, on the day of , 1839, said defendant, at the instance and request of A. B. Newsom, the payee of the sealed note or writing obligatory in the plaintiff's declaration mentioned, purchased of the said Newsom two certain fillies, that is to say, a dark brown filly, said to have been foal*d*ed in the spring of 1835; and a certain sorrel filly, said to have been foal*d*ed the 22d day of June, 1837, at and for a large sum of money, to wit, the sum of four thousand dollars, to be paid by the said defendant to the said Newsom, for the payment of which said sum, in part, defendant gave to said Newsom the writing obligatory or sealed note in the said plaintiff's declaration described; and said defendant avers, that said writing obligatory was given for and upon the consideration aforesaid, and for and upon no other consideration whatever; and said defendant avers, that the said Newsom falsely and fraudulently represented to the said defendant that the said fillies were raised by him, the said Newsom, and that the said fillies were sound, when in truth and in fact the said fillies were not raised by the said Newsom, nor were either of them sound, but on the contrary thereof were unsound, all of which was known by the said Newsom to be false and untrue; and the said Newsom further falsely and fraudulently represented that said fillies had certain pedigrees, that is to say, that the said sorrel filly "was got by the imported horse Leviathan, dam by Oscar, he by Wonder, and he by imported Diomede, Oscar's dam Rosey Clark, by imported *Saltram*, and he by Eclipse, and he by Munk and by *Squirt*, and he by *Barttel's Duldrop*, and he by *Darley's* Arabian, her grand dam by *Hydiraloi*, and he by *Byon O'Gryn*; great grand dam a full bred Medley mare, having been got out of a Medley mare." And that the said dark brown filly was got by the imported horse Leviathan, her dam by Old Stockholder, and he by Old Sir Arc*hy*, son of the imported horse Old Diomede, imported horse Old Citizen, imported horse *Homes' Strling*, son of Volunteer, of England, imported horse Mouse Trap, Harris, Eclipse, imported horse Old Janus, imported horse Bayloes, Old Fearnaught, Apollo, imported horse Moore's Partner, imported horse Silvereye, imported horse Jolly Roger, imported Mary Gray, her grand dam by Old Conqueror, and he by Wonder, Phenomenon, King Herrod, Leeds, Tartar, Partner, *Gigg*, Billy Turk, and his dam by

imported *Saltran;* her great grand dam was purchased by G. G. Washington, of Nashville, from General Wade Hampton, of South Carolina; when in truth and fact the said fillies had not the pedigrees so as aforesaid represented by the said Newsom, and that the said Newsom knew that the said pedigrees, so represented by him as aforesaid, were false and untrue; and said defendant avers, that said purchase was made on the faith of the representations of the said Newsom, and that said fillies were purchased as aforesaid for their blood and for the "*turff*," all which said defendant is ready to verify; and so said defendant says, that said writing obligatory or seal note in said plaintiff's declaration mentioned, was obtained from him by fraud, by the said Newsom, and is therefore void in law; wherefore he prays judgment whether said plaintiff ought to have or maintain his said action thereof against, &c.

PECK & CLARK,
Attorneys for defendant.

And on the day and year last aforesaid the plaintiff filed a demurrer, as follows, to wit:

"District court. And the said plaintiff, as to the said further plea of the said defendant by him above pleaded, sayeth, that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him from having or maintaining his action thereof against him, the said defendant, and that the said plaintiff is not bound by law to answer the same; and this the said plaintiff is ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment, and his damages, by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him.

VANDEGRAFF, STEELE & METCALFE,
Atty's for plaintiff."

And afterwards, to wit, on the day and year last aforesaid, the defendant filed an amended plea, in the following words and figures, to wit:

ROBERT W. WITHERS,
ads. } District court.
RICHARD MAY.

Amended plea filed by leave of the court.

And for a further plea in this behalf said defendant, by leave, &c., says, onerari non, because he says that heretofore, to wit, on the day of , in the year 1839, said defendant, at the instance and request of one A. B. Newsom, the payee of the sealed note or writing obligatory in the plaintiff's declaration mentioned, purchased of the said Newsom two certain fillies, that is to say, one dark brown filly, said to have been foal*ded* in the spring of the year 1835, and one sorrel filly, said to have been foal*ded* the 22nd day of June, in the year 1837, at and for a large sum of money, to wit, the sum of four thousand dol-

lars, to be paid by the said defendant to the said Newsom; for the payment of which said sum, in part, defendant gave to the said Newsom the said sealed note or writing obligatory in the said plaintiff's declaration described, and said defendant avers that said sealed note was given for and upon no other consideration whatsoever. And said defendant further avers, that the said Newsom falsely and fraudulently represented to said defendant that the said fillies were raised by himself, and that the said fillies were sound, and that the said fillies had certain pedigrees, that is to say, that the said sorrel filly was got by the imported horse Leviathan, dam by Oscar, he by Wonder, and he by imported Diomede; Oscar's dam Rosey Clark, by imported Saltram, and he by Eclipse, he by Marsk, and he by Squirt, and he by Bartlet's Childress, and he by Darby's Arabian; her granddam by *Hyderali*, and he by *Bryon Olynn*; great granddam a full bred Medley mare, having been got by a Medley horse, and out of a Medley mare. And that the said dark brown filly was foal*ded* in the spring of 1835, and was got by the imported horse Leviathan; her dam by old Stockholder, and he by old Sir Archie, son of the imported horse Diomede, imported horse Old Citizen, imported horse Horner's Sterling, son of Volunteer of England, imported horse Mouse Trap, Harris' Eclipse, imported horse Old Janus, imported horse Bayloes' Old Fearnaught, Apollo, imported horse Moore's Partner, imported horse Silver Eye, imported horse Jolly Roger, imported Mary Gray; her granddam by Old Conqueror, and he by Wonder, Phenomenon, King Herrod, Leed's Tartar, Partner, Gigg, Billy, Turk; and his dam by imported Saltram. Her great granddam was purchased by G. G. Washington, of Nashville, from Gen. Wade Hampton, of South Carolina, which certificate is lost or mislaid, but was of the best of stock, and sold for the highest price for that day and time; all which said representations as to the soundness of the said fillies, as to the fact that they were raised by the said Newsom, and as to their pedigrees, were false and untrue, and known to be false and untrue by the said Newsom, and were so made, as aforesaid, by the said Newsom to deceive and defraud the said defendant.

And said defendant further says that he, relying upon the said false and fraudulent representations of the said Newsom, and believing the same to be true, made the said purchase of the said fillies. And said defendant further says, that said fillies were purchased by him as aforesaid for their blood, and for the turf, and that otherwise they were wholly worthless to the said defendant. And said defendant further says, that the said Newsom was before, and at, and hath been ever since, and still is, a citizen of the State of Tennessee, residing three hundred miles or more from the residence of said defendant, who then resided, and still resides, in the county of Greene, in this State; and that said Newsom brought the said fillies from Tennessee to the residence of said defendant, in Greene county, and then sold them to said defendant as aforesaid.

And said defendant further saith, that he did not discover the extent of the unsoundness of the said fillies until a long time after said pur-

chase, to wit, the fall after the said purchase, when they were being trained for the turf, and that he did not learn that the pedigrees were false until a long time after said purchase, to wit, some time in the fall of 1839 or winter of the year 1839, '40.

And said defendant further saith, from the time he discovered the permanent unsoundness of the said fillies as aforesaid, and the falsity of the said pedigrees as aforesaid, he was ready, willing, and desirous to, and would have returned and delivered the said fillies to the said Newsom if he had had an opportunity so to do, which he did not; and that from the discovery of the fraud of the said Newsom as aforesaid, up to the death of the said fillies, which happened during the winter and spring of the year 1840, he was willing and ready to deliver and return the said fillies to the said Newsom, as aforesaid.

And said defendant further saith, that said fillies died, as aforesaid, without the fault or neglect of the said defendant or his servants; all which several matters said defendant is ready to verify. And said defendant saith, that the said sealed note or writing obligatory was obtained from him by the said Newsom by the false and fraudulent representations as aforesaid, and is, therefore, fraudulent and void in law; wherefore said defendant prays judgment, whether he ought to be charged with the said debt, &c.

PECK & CLARK, *Atty's.*

And afterwards, to wit, on the day and year last aforesaid, the plaintiff filed a demurrer to the said amended plea of the defendant, which is as follows, to wit:

And the said plaintiff, as to the said amended plea by defendant last pleaded, saith, that the same, and the matters and things therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him from having or maintaining his action thereof against him, the said defendant; and that the said plaintiff is not bound by law to answer the same, and this the said plaintiff is ready to verify; wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment, and his damages, by reason of the not performing of the said several premises and undertakings in the said declaration mentioned, to be adjudged to him.

STEELE & METCALFE,
Atty's for plaintiffs.

And now, at this day, to wit, on the twenty-seventh day of May, anno domini one thousand eight hundred and forty-three, being a day of the term of said court first aforesaid, judgment was rendered as follows, to wit:

WILLIAM B. GREENE, administrator, with the will annexed, of Richard May, deceased,
vs.
ROBERT W. WITHERS.

This day came the parties, by their attorneys, and the issues of law

joined between the parties having been heard by the court, and mature deliberation being had thereon—

It is considered by the court now here, that the defendant's pleas are not sufficient in law to bar or preclude the said plaintiff from having or maintaining the aforesaid action against him, the said defendant; and that said plaintiff do recover against the said defendant the sum of three thousand dollars, the debt in said plaintiff's declaration mentioned, and the further sum of eight hundred and eighteen dollars damages, by said plaintiff sustained by reason of the detention of the debt aforesaid, as assessed by the clerk of this court, together with the costs in this behalf expended.

And afterwards, to wit, on the seventh day of June, anno domini one thousand eight hundred and forty-three, was filed in the clerk's office of said court a writ of error bond, which, with the endorsement thereon, is in the words and figures following, to wit:

Circuit court of the United States for the judicial circuit, southern district of Alabama:

ROBERT W. WITHERS,
vs.
WILLIAM B. GREENE, administrator of Richard May, deceased. } In error.

Know all men by these presents, that we, Robert W. Withers and Allen C. Jones, are held and firmly bound unto William B. Greene, administrator, with the will annexed, of Richard May, deceased, in the sum of seven thousand six hundred and thirty-six dollars, to be paid to the said William B. Greene, his executors, or administrators; to the payment of which, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 29th day of May, A. D. 1843.

Whereas the above named Robert W. Withers hath prosecuted a writ of error to the circuit court of the United States for the fifth judicial circuit, southern district of Alabama, to reverse the judgment rendered in favor of the above named William B. Greene, administrator as aforesaid, against the above named Robert W. Withers, in the above mentioned suit, by the district court of the United States for the middle district of Alabama. Now, therefore, the condition of this obligation is such, that if the above named Robert W. Withers shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

ROBERT W. WITHERS, [SEAL.]
[SEAL.]
ALLEN C. JONES. [SEAL.]

Signed and sealed in presence of—

I approve the within bond, and direct that a writ of error issue agreeably to the prayer of the petitioner.

May 30th, 1843. WM. CRAWFORD, *Judge*.

Whereupon, on the said seventh day of June, anno domini one thousand eight hundred and forty-three, a writ of error was issued and filed in the clerk's office of said court, in the following words, to wit:

UNITED STATES OF AMERICA:

The President of the United States of America, to the judge of the district court of the United States of America, for the middle district of Alabama, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said district court before you, between William B. Greene, administrator, with the will annexed, of Richard May, deceased, plaintiff, and Robert W. Withers, defendant, a manifest error hath happened, to the great damage of the said Robert W. Withers, as by the complaint of said Robert W. Withers appears; and it being fit that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States for the fifth judicial circuit, southern district of Alabama, together with this writ, so that you have the same at the place of holding said circuit court in the city of Mobile, in the State of Alabama, on the fourth Monday of November next, in the said circuit court to be then and there held, that there the record and proceedings aforesaid being inspected, the said circuit court may cause to be done therein, to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the honorable John McKinley, presiding judge of said circuit court, this seventh day of June, in the year of our Lord [L. S.] one thousand eight hundred and forty-three, and of the independence of the United States the sixty-seventh year.

Attest: A. G. GOOCH,

Clerk D. C., middle district of Alabama.

I, Albert G. Gooch, clerk of the district court of the United States for the middle district of Alabama, hereby certify, that the foregoing is a true and complete transcript of the record and proceedings of said court, in a certain suit lately determined therein, in which William B. Greene, administrator, with the will annexed, of Richard May, deceased, was plaintiff, and Robert W. Withers was defendant; also a true copy of the writ of error bond executed by said Withers, and of the writ of error sued out by said Withers to the circuit court of the United States for the fifth judicial circuit, southern district of Alabama, as appears from the records and proceedings of said district court now remaining in said clerk's office.